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## **EXHIBIT B**

1 Richard L. Mahfouz II (State Bar No. 246739)  
Peter B. Sinclair (State Bar No. 228089)  
2 Christopher H. Conti (State Bar No. 275032)  
CLERKIN & SINCLAIR, LLP  
3 701 B Street, Suite 1160  
San Diego, CA 92101  
4 Tel.: 619-308-6550  
Fax: 619-923-3143  
5 Email: rlmahfouz@clerkinlaw.com

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7 Attorneys for Defendant VAYA TELECOM, INC.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN DIEGO

10 NORTH COUNTY COMMUNICATIONS  
11 CORPORATION, a California corporation,

12 Plaintiff,

13 v.

14 VAYA TELECOM, INC., a California  
15 corporation, and DOES 1-100, inclusive,

16 Defendants.

CASE NO.: 37-2011-00083845-CU-BC-CTL

**DEFENDANT'S REPLY TO PLAINTIFF  
NORTH COUNTY COMMUNICATIONS  
CORPORATION'S OPPOSITION TO  
DEMURRER**

DATE: July 8, 2011

TIME: 10:00 a.m.

DEPT: C-60

JUDGE: Hon. Lisa Foster

DATE ACTION FILED: January 14, 2011

TRIAL DATE: Unassigned

17  
18 Defendant Vaya Telecom, Inc. ("Vaya" or "Defendant"), respectfully submits the  
19 following Reply to Plaintiff North County Communications Corporation's ("NCC" or  
20 "Plaintiff") Opposition to Defendant's Demurrer.

21 **I. INTRODUCTION**

22 Despite a complete absence of case law demonstrating that California Courts have  
23 applied the California Public Utility Commission's ("CPUC") ruling in the Pac-West cases to  
24 enforce a CLECs state tariff, NCC continuously asserts that this is a simple collections matter.  
25 Such an assertion is at odds with the Ninth Circuit's characterization of intercarrier

1 compensation as one of complexity and requiring administrative expertise. North County  
2 Comme'ns Corp. v. Cal. Catalog & Tech., 594 F.3d 1149, 1161 (9th Cir. 2010) (Notice of  
3 Lodgment ("NOL") Exhibit A) ("[I]ssues regarding the applicability of § 207 are complex and  
4 should not be decided without the participation of the FCC, the agency principally responsible  
5 for the enforcement of the Telecommunications Act.") Although NCC has filed the underlying  
6 complaint in superior court, the cases it generally relies on to support its right to compensation  
7 are comprised of matters presided over by the CPUC, all of which involved Internet Service  
8 Provider ("ISP") traffic. NCC argues that the Court should blindly follow three technologically  
9 and contextually distinguishable cases decided back in 2004 and 2007, one of which includes a  
10 default judgment where the merits of the case were not decided.

11 NCC makes this argument boldly, despite a complete failure to acknowledge that the  
12 reasonableness of the very tariff at issue in this case is currently pending before the CPUC. In  
13 North County Comme'n Corp. v. MetroPCS Cal., LLC the Federal Communications  
14 Commission ("FCC") recently held that the CPUC was the proper authority to determine  
15 intercarrier compensation in the absence of a negotiated agreement. 24 F.C.C.R. 3807, 3819 ¶ 9  
16 (2009) (NOL Exhibit B). Even more recently, this ruling was upheld by the Court of Appeals for  
17 the District of Columbia, leaving NCC's tariff pending before the CPUC. MetroPCS Cal., LLC  
18 v. Fed. Comme'n Comm. and United States of America, No. 10-1003, p. 3 (D.C. Cir. 2011)  
(Decided May 17, 2011) (NOL Exhibit C).

19 Vaya has vigorously asserted in its Demurrer that pursuant to the primary jurisdiction  
20 doctrine this Court should defer jurisdiction to the CPUC, and the pendency of the CPUC's  
21 ruling in MetroPCS leaves even more room for an inconsistent ruling that would frustrate the  
22 supervisory policies of the CPUC. Further clouding the true reasonableness of NCC's tariff is  
23 the overwhelming assertion by other carriers that NCC has engaged in a traffic pumping scheme.  
24 See Comments of CTIA-The Wireless Association, WC Docket No. 07-135 Exhibit A (April 1,  
25 2011) (NOL Exhibit D); see also Letter From Donna Epps, Verizon, to Marlene H. Dortch,

1 Secretary Federal Communications (Filed Nov. 12, 2010) (NOL Exhibit E). Because NCC's  
2 business model leaves room for regulatory arbitrage and takes advantage of a regulatory scheme  
3 initially created to foster competition, blindly following the Pac-West cases would not only be  
4 improper, but imprudent under the circumstances of such widespread allegations.

## 5 **II. ARGUMENT**

### 6 **A. NCC's Tariff Is Currently Pending Before The CPUC In A Separate Action** 7 **Which Leaves Room For Inconsistent Application Of Administrative And** 8 **Regulatory Law**

9 The U.S Supreme Court has held that superior courts should defer jurisdiction to  
10 appropriate administrative bodies, such as state public utilities commissions, when the issues  
11 before the court are within the "special competence of an administrative body." U.S. v. W. Pac.  
12 R.R. Co., 352 U.S. 59, 64; *see also* Farmers Ins. Exch. v. Super. Ct. (1992) 2 Cal.4th 337. The  
13 doctrine applies in situations where an issue of law should be addressed initially by an  
14 administrative agency in order to promote the need for (1) uniformity of application of  
15 administrative regulations and uniformity of answers to administrative questions, and (2) the  
16 need for expert and specialized knowledge of the relevant agency. Id. at 377, 386-390.

17 This Court should defer jurisdiction to the CPUC in order to ensure uniform application  
18 of administrative regulation through the utilization of the CPUC's expertise, while also  
19 preserving the resources of the Court. This is especially true in light of the fact that the **very**  
20 **tariff at issue in this case is currently pending a determination of its reasonableness before**  
21 **the CPUC.** In a similar case involving NCC as Plaintiff, the FCC recently held **that the CPUC**  
22 **was the proper authority to determine compensation in the absence of a negotiated**  
23 **agreement.** North County Comm'n Corp. v. MetroPCS Cal., LLC, at 3807, 3819, ¶ 9. In this  
24 case the FCC refused to determine the amount of compensation owed to NCC for intrastate  
25 traffic exchanged with a commercial mobile radio services ("CMRS") carrier. Id. Like the  
instant case, all traffic was intrastate and exclusively flowing inbound to NCC without any

1 outbound traffic originating from NCC. The dispute arose when, in the absence of an  
2 interconnection agreement, NCC unilaterally set a termination rate and began invoicing for  
3 termination fees that MetroPCS refused to pay. *See MetroPCS Cal., LLC v. Fed. Comm'n*  
4 *Comm. and U.S.*, at 3. Ultimately, the FCC directed NCC to bring its claims before the CPUC.  
5 *North County Comm'n Corp. v. MetroPCS Cal.*, at p. 3819, ¶ 9 (“[T]he more appropriate  
6 venue for determining what constitutes reasonable compensation for [NCC’s] termination of  
7 intrastate traffic originated by MetroPCS is not the [FCC], but rather the California PUC, via  
8 whatever procedural mechanism it deems appropriate under state law”). MetroPCS recently  
9 challenged the FCC’s ruling in the Court of Appeals for the District of Columbia. *See generally*  
10 *MetroPCS Cal., LLC, supra*. In upholding the FCC’s ruling, the Court of Appeals noted that the  
11 FCC’s refusal to preempt state regulation of intrastate rates was proper because the traffic was  
12 wholly intrastate. *Id.* at 8-9. The Court held:

13 “...allowing state agencies to set intrastate termination rates  
14 furthers federal policy of encouraging and compensating  
15 interconnection while retaining the dual regulatory structure  
16 created by subsections 152(a) and (b) of the Communications act.”  
17 *Id.* at 7.

18 Vaya finds these holding and associated cases exceptionally persuasive. MetroPCS and  
19 petitioners are currently challenging **the same tariff** that NCC argues is both the basis for its  
20 right to damages, and the terms of an implied contract to which a writ of attachment may issue.  
21 NCC’s federal causes of action have been brought pursuant to §§ 201(b), 206, and 207 of The  
22 Telecommunications Act (“the Act”). Complaint, p.2, ¶ 9. As discussed in Vaya’s Demurrer, in a  
23 similar claim the Ninth Circuit affirmed a District Court’s dismissal of NCC’s claims under the  
24 primary jurisdiction doctrine. *Cal. Catalog* at 1162 (declining to rule on NCC’s compensation  
25 claim in the first instance). In analyzing the issue of the existence of a private right of action  
under these causes of action, the Court notes that “issues regarding the applicability of § 207 are  
complex and should not be decided without the participation of the FCC, the agency principally